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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-394

UNITED STATES OF AMERICA, PETITIONER

v.

L.O. WARD d/b/a
L.O. WARD OIL AND GAS OPERATIONS, RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF THE AMICI CURIAE: MOUNTAIN STATES LEGAL FOUNDATION, INDEPENDENT PETROLEUM ASSOCIATION OF THE MOUNTAIN STATES, ROCKY MOUNTAIN OIL & GAS ASSOCIATION, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA

JAMES G. WATT
KEA BARDEEN
Mountain States Legal Foundation
1845 Sherman Street, Suite 675
Denver, Colorado 80203
Attorneys for Amici Curiae

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INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA

INTEREST OF THE AMICI

The Mountain States Legal Foundation (MSLF) is a nonprofit, membership, public interest legal organization dedicated to bringing before the courts those issues vital to the protection and defense of individual liberties, private property rights, and the free enterprise system. The Foundation seeks to protect its members and the public from costly, overly intrusive, and unnecessary governmental regulation.

The Independent Petroleum Association of the Mountain States (IPAMS) is a nonprofit trade association of independent oil and gas producers in 11 western states, dedicated to representing the common interests of those independent

producers before governmental authorities and other entities concerned with oil- and gas-related issues.

The Rocky Mountain Oil & Gas Association (RMOGA) is a nonprofit trade association of individuals and independent and major companies involved in every phase of oil and gas exploration, production, transportation, refining and marketing in the Rocky Mountain region. RMOGA is dedicated to promoting the accumulation, dissemination, and discussion of information concerning the petroleum industry to foster the best interests of the public and the industry.

The Independent Petroleum Association of America (IPAA) is a national organization of independent explorer-producers of crude oil and natural gas, dedicated to representing the common interests of those independent explorer-producers before governmental authorities and other entities concerned with oil- and gas-related issues.

These four organizations, MSLF, IPAMS, RMOGA, and IPAA, and their members, all share the common concern that a judicial decision supporting the Government's position in this case will permit Congress to expand its use of the highly offensive practice of compelling individuals, by threat of fine or imprisonment, to admit to statutory violations in order to use those admissions as the basis for imposing automatic penalties, to other areas of governmental regulation.

The amici have received written consent from Ward and the United States to file this brief. Copies of these letters have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

The amici generally agree with the statement of the case prepared by the United States [hereinafter "the Government"]. The following synopsis is offered simply for the purpose of highlighting those facts which the amici consider especially significant.

A relatively minor quantity of oil spilled from a retention pit owned by L.O. Ward Oil and Gas Operations, a sole proprietorship, into navigable waters. When L.O. Ward became aware of the oil spill, he cleaned it up and reported it to the

Environmental Protection Agency (EPA), as required by section 311(b)(5) of the Federal Water Pollution Control Act (FWPCA)[1] [hereinafter §311(b)(5)].[2] Section 311(b)(5) requires that any discharge of oil in violation of section 311(b)(3) of the FWPCA [hereinafter §311(b)(3)][3] be reported to EPA, with the failure to report punishable by fine or imprisonment. When EPA received Ward's report, it forwarded a copy to the Coast Guard. Then, solely on the basis of that report, the Coast Guard, acting pursuant to section 311(b)(6) of the FWPCA [hereinafter §311(b)(6)][4] assessed a $500 penalty against Ward for his violation of §311(b)(3).

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[1]The amici have, to the extent possible, adopted the abbreviations used by the Government in its brief, including the use of FWPCA to refer to the Clean Water Act prior to the 1977 amendments. *See* Brief for the United States at 3 n.1.

[2]Section 311(b)(5) of the FWPCA states: "Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement."

[3]Section 311(b)(3) of the FWPCA states: "The discharge of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone in harmful quantities as determined by the President . . . is prohibited . . . ."

[4]Section 311(b)(6) of the FWPCA states: "Any owner or operator of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. No penalty shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such Secretary . . . ."

SUMMARY OF ARGUMENT

The unique statutory enforcement mechanism of the FWPCA, which combines a self-reporting requirement [§311(b)(5)] with an automatic penalty [§311(b)(6)] for statutory violations [§311(b)(3)], is a highly oppressive and improper use of governmental power, regardless of whether the penalty is intended as a punishment or simply as compensation to the government for injuries to navigable waters. But the general impropriety of the mechanism need not be resolved since the §311(b)(6) penalty is criminal in nature, and the mechanism therefore unquestionably violates the Fifth Amendment privilege against self-incrimination by completely eviscerating the accusatorial system of justice through the requirement that an individual, under pain of fine or imprisonment, impose a punishment on himself, through his own testimony.

The Fifth Amendment to the Constitution states: "No person . . . shall be compelled in any criminal case to be a witness against himself." The facts of the case at bar reveal that Ward is a natural person and that he was compelled to be a witness against himself by a statutory provision which required, on pain of fine or imprisonment, that he furnish the EPA with testimonial evidence admitting his violation of the FWPCA, which evidence was then used as the sole basis for imposing the §311(b)(6) penalty on him. The sole remaining issue necessary to determine the applicability of the Fifth Amendment privilege is: Is the imposition of the §311(b)(6) penalty a "criminal case" for purposes of the Fifth Amendment?

It would seem that the simplest way to resolve that issue would be to define the term "criminal case" within the Fifth Amendment context and then apply that definition to the facts of the case. However, the necessary analysis is not that simple. The amici believe that their brief is unique in its attempt to examine and clarify the nature of the proper judicial inquiry in this case and to identify those distinctions which must be recognized to apply that inquiry properly.

The question of whether a penalty such as the §311(b)(6)

penalty is "criminal" for purposes of the Fifth Amendment privilege is one of first impression, since it requires the Court to address simultaneously the issue of whether the §311(b)(6) penalty is punitive in nature and the issue of whether the §311(b)(5) self-reporting requirement violates the Fifth Amendment privilege. An understanding of the relationship between these two issues is essential because only if both issues are considered in proper sequence and are approached as distinct yet vital parts of the proper judicial inquiry can a sound analysis of the case at bar be achieved.

The standard judicial inquiry for determining whether a statute is criminal/penal in nature is a simple matter of statutory construction which focuses on whether or not the congressional purpose in enacting the statute was punitive. The tools of this inquiry are statutory language, legislative history, statutory context, and the indicators set forth by this Court in *Kennedy v. Mendoza-Martinez,* 272 U.S. 144 (1963). The application of this standard judicial inquiry into the penal nature of statutes has suffered from three significant, and not altogether unrelated, abuses which have created a great deal of confusion. First, in seeking to determine whether the purpose of a statute is punitive or nonpunitive, the courts in their opinions and the Government in its brief in this case have framed the inquiry using ambiguous terms like "civil," "regulatory," and "remedial," which has hindered their efforts to distinguish punitive and nonpunitive purposes. Second, in seeking to determine the nature of the penalty, the courts and the Government have improperly relied on cases which did not focus on the nature of the penalty involved but instead focused on constitutional protections not at issue in this case. Third, in ostensibly examining and applying the indicators of congressional intent to the facts of a case, the courts and the Government have permitted their unarticulated judgments about the importance of the constitutional protections at stake to influence their interpretations of the intent indicators. These errors must not be left unrecognized since it is on the basis of these errors and little else that the Government supports its position in this case.

The statutory language, legislative history, and statutory context of §311(b)(6), and the application of the *Mendoza-*

Martinez factors demonstrate that Congress' purpose in enacting §311(b)(6) was punitive. Section 311(b)(6) is described as a "penalty" which by definition means "punishment." The legislative history of statutory sections analogous to §311(b)(6) indicates that the purpose of the penalty was to deter that conduct which caused or permitted oil spills, revealing that Congress' concern was with the punitive effect which the penalty would have on persons subject to it and not with being compensated for injuries or collecting revenue. The statutory context of §311(b)(6) confirms a punitive purpose.

The *Mendoza-Martinez* factors also indicate a punitive intent. The fact that five different courts have applied the *Mendoza-Martinez* factors to the §311(b)(6) penalty permits a unique opportunity to study the application and use of the factors. The amici have set forth a table comparing the various §311(b)(6) decisions in the appendix to this brief.

For the sake of analytical accuracy, it is only *after* having sought to determine the congressional purpose behind the penalty that the values of the constitutional protection at stake should be considered. If the inquiry into the purpose of the statute reveals that it is punitive, then the Fifth Amendment privilege must be applied and the inquiry ends. This is the conclusion reached by the Tenth Circuit Court of Appeals and the amici urge the Court to affirm its reasoning. However, even if the Court does not find that a punitive intent has been conclusively demonstrated, the Fifth Amendment privilege should still be found to apply in this case. The principle established by this Court in the self-reporting cases requires that uncertainties be resolved in favor of the application of the privilege in this case since the likelihood that the penalty is punitive in nature is substantial and the governmental interest at stake is comparatively insignificant.

The Tenth Circuit Court of Appeals' decision barring use of the §311(b)(5) report as the basis for imposing the §311(b)(6) penalty should be upheld. That decision properly recognizes and effectuates the purposes of the Fifth Amendment privilege without threatening the viability of the enforcement scheme of the FWPCA.

ARGUMENT

The issue which Ward and the Government presented to the Tenth Circuit Court of Appeals was: Is Ward entitled to claim the Fifth Amendment privilege against self-incrimination in a proceeding by the government to collect the §311(b)(6) penalty from him? MSLF, IPAMS, and RMOGA, in their amici brief and their oral argument before the Tenth Circuit,[5] argued that that issue was unnecessarily broad. The amici pointed out that since Ward was a natural person, since §311(b)(5) compelled his report to EPA, since his report was testimonial in nature and since his report led directly to the imposition of the §311(b)(6) penalty, the court could find that at least four of the five elements necessary for the application of the Fifth Amendment privilege[6] were unquestionably present. The Tenth Circuit so held (Pet. App. 6a-7a) and the Government has not appealed that holding. The only remaining issue before this Court is the one which the amici framed for the Tenth Circuit: Is the imposition of the §311(b)(6) penalty a "criminal case" for the purposes of the Fifth Amendment privilege against self-incrimination?

In its simplest form, the resolution of this issue requires only a determination of what constitutes a "criminal case" for purposes of the Fifth Amendment privilege and a determination of whether the facts of the present case satisfy that definition. But the necessary analysis is more complex. The *Ward* case is a case of first impression. It is not a case of first impression because it requires the Court to determine whether or not a statute like §311(b)(6) is punitive in nature. As this

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[5]MSLF, IPAMS and RMOGA submitted an amici brief to the Tenth Circuit and were granted special leave of the court, and additional time, to present oral argument. The decision of the Tenth Circuit in this case reflects much of these amici's analysis. IPAA, which joins MSLF, IPAMS and RMOGA on this brief, submitted its own amicus brief to the Tenth Circuit.

[6]The Fifth Amendment states: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." This language reveals the five elements necessary for the application of the privilege against self-incrimination: (1) a person, (2) compulsion, (3) a criminal case, (4) testimony, and (5) incrimination (a causal link between the testimony and the criminal case).

Court observed in *Trop v. Dulles,* 356 U.S. 86, 96 (1958): "This Court has been called upon to decide whether or not various statutes were penal ever since 1798." It is also not a case of first impression because it requires the Court to examine a self-reporting requirement like §311(b)(5) in light of the Fifth Amendment privilege against self-incrimination. *See,e.g., California v. Byers,* 402 U.S. 424 (1971); *Marchetti v. United States,* 390 U.S. 39 (1968); *Grosso v. United States,* 390 U.S. 62 (1968); *Haynes v. United States,* 390 U.S. 85 (1968); *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965); *United States v. Sullivan,* 274 U.S. 259 (1927) [hereinafter "the self-reporting cases"]. It is a case of first impression because, for the first time, this Court must address these two issues in conjunction with one another and decide how the separate and distinct lines of cases affecting each apply when the two issues are resolved simultaneously. The effect of combining a self-reporting requirement like §311(b)(5) and an automatic penalty like §311(b)(6) proves the proposition that the whole is often greater than the sum of its parts.

The relationship between the question of whether the §311(b)(6) penalty is punitive and the question of whether the §311(b)(5) self-reporting requirement violates the Fifth Amendment privilege against self-incrimination is not complex, but it is essential. As this brief will show, this case demands, at the very least, the recognition that both the nature of the sanction and the nature of the constitutional protection involved must be taken into account in determining the issue before the Court.

I. THE FWPCA'S ENFORCEMENT MECHANISM, WHICH COMBINES A SELF-REPORTING REQUIREMENT WITH AN AUTOMATIC PENALTY FOR STATUTORY VIOLATIONS, IS AN ABUSIVE AND IMPROPER USE OF GOVERNMENTAL POWER.

It has been said that a society is judged by the way it treats its criminals. *See generally Miranda v. Arizona,* 384 U.S. 436,

480 (1966). It could be as appropriately said that a society is judged by the way it treats its citizens. If the Fifth Amendment privilege against self-incrimination protects the rights of criminals and insures a fair government-individual balance in the criminal justice system, it must no less protect the rights of ordinary citizens whose property and freedoms are threatened by oppressive regulatory schemes such as the one before this Court today.[7]

If one looks at the elements of the FWPCA's unique[8] enforcement scheme *individually,* they do not seem particularly offensive. Section 311(b)(3), which prohibits all discharges of harmful quantities of oil, is not unreasonable. The §311(b)(5) requirement that oil spills be reported to the government is not, in itself, that objectionable. Nor is the §311(b)(6) penalty, which imposes a fine of up to $5,000 on the discharge of oil, in itself, particularly objectionable. But it takes little argument to show that the combination of these provisions is highly oppressive.

Section 311(b)(3) prohibits the discharge of oil into navigable waters. Section 311(b)(5) requires that those spills *which violate §311(b)(3)* be reported. Section 311(b)(6) makes all individuals and companies discharging oil in violation of §311(b)(3) automatically liable for a penalty of up to $5,000 for each violation, regardless of whether the discharge was the result of any event which the individual or company could control. In enforcing the §311(b)(6) penalty, the mandate of the Coast Guard is to collect the penalty for every violation of

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[7]The Court eloquently described the purposes of the Fifth Amendment privilege in these terms in *Miranda v. Arizona,* 384 U.S. 436, 460 (1966): "The constitutional foundation underlying the privilege is the respect a government — state or federal — must accord to the dignity and integrity of its citizens. To maintain a fair state-individual balance, to require the government to shoulder the entire load, to respect the inviolability of the human personality, our accusatorial system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."

[8]It appears that the FWPCA is the only statute in which Congress has combined a compelled report with an automatic penalty. *See United States v. LeBeouf Bros. Towing Co.,* 377 F. Supp. 558, 566 (E.D. La. 1974), *rev'd,* 537 F.2d 149 (5th Cir. 1976).

§311(b)(3). Brief for the United States [hereinafter "Gov't Brief"] App. at 3a.

In essence, §311(b)(5) forces those who violate §311(b)(3) to impose the §311(b)(6) penalty on themselves, thereby saving the government all that work. The §311(b)(5) report notifies the government in the first instance that a spill which violates §311(b)(3) has occurred. Then the report, in and of itself, proves all the elements of a violation of §311(b)(3). On the basis of the report alone, as in this case, the Coast Guard can collect the §311(b)(6) penalty.

If the §311(b)(6) penalty is "criminal" in nature there can be no question but that this enforcement scheme violates the Fifth Amendment privilege. It totally eviscerates the accusatorial system of justice. However, even if the §311(b)(6) penalty is not "criminal" in nature, the Court's concern should not end, because the Court's approval of the FWPCA's enforcement scheme would still permit an improper extension of the government's power. This is illustrated by the following analysis.

In many cases, the courts have recognized the government's right to wear two hats, to act both as the government and as an individual. For example, this Court has held that the government can bring both a criminal and a civil (tort) action for the same offense without violating the double jeopardy clause, reasoning that the right of the government *qua* government to punish an offense against the public good should not deprive the government of the separate and distinct right to act as an individual to obtain redress for injuries.[9] *See, e.g., Rex Trailer Co. v. United States,* 350 U.S. 148, 151 (1956).

In the present circumstances, however, *even if* the government's purpose in enacting the §311(b)(6) penalty was to obtain compensation for irremediable injuries to navigable

[9]This reasoning comports with the traditional distinction between a crime and a tort: "Although the same act may constitute both a crime and a tort, the crime is an offense against the public pursued by the sovereign while the tort is a private injury which is pursued by the injured party." 21 Am. Jur. 2d *Criminal Law* §2 (1965). The fact that the government is the government does not prevent it from also being the injured party in some cases.

waters (which the amici will show conclusively that it was not), the Court should be wary. For what the government would be seeking to do, even in that instance, would not be to exercise *separately* its power to act as the government and its power to act as an individual, but to exercise both powers at once in order to unjustly maximize the advantages of each. On one hand, it is in its capacity as the government that the government can require this nation's citizens to report to it on their activities. One individual cannot similarly require such reports from other individuals. On the other hand, it is in its capacity *as an individual,* and not as the government, that the government can seek to recover compensation for injuries done to it. By merging its governmental and individual capacities, the government seeks to avoid the limitations of each. It would be seeking to avoid the Fifth Amendment limitation on its governmental power, which limitation bars it from compelling persons to report to it on those activities which it punishes as being contrary to the public good, by arguing that it is only seeking a report on those activities which injure it and not on those activities which are contrary to the public good, even though the activities themselves could be described both as contrary to the public good and as injurious to the government. At the same time, the government would be seeking to avoid the primary limitation and burden which, in almost every instance, rests on the individual who seeks compensation, which is that the person seeking compensation must identify the person who has injured him and prove the case against that person *by his own individual efforts.* Even if the government were only seeking compensation through the §311(b)(6) penalty, it would be unfairly, albeit effectively, utilizing its governmental powers to further its own "individual" purposes.

Historically it has been the government's use of the criminal justice system which has had to be carefully restricted to protect the citizens' rights and freedoms against oppression. However, if statutory schemes like that at bar become the order of the day it will be ever-burgeoning "efficient" regulation which ultimately jeopardizes our most precious

individual rights.[10]

In the case at bar, however, the Court should not have to deal with the question of the lawfulness of a mechanism designed to require tortfeasors to confess their torts and to redress the government for the resulting injuries, since, as the remainder of the brief will show, the § 311(b)(6) penalty is "criminal" for purposes of the Fifth Amendment privilege.

II. THE APPLICATION TO THE FACTS OF THIS CASE, OF THE STANDARD JUDICIAL INQUIRY USED IN DETERMINING THE PENAL NATURE OF A STATUTE CONCLUSIVELY DEMONSTRATES THAT THE §311(b)(6) PENALTY IS PUNITIVE IN NATURE.

A. DEFINING THE STANDARD JUDICIAL INQUIRY USED IN DETERMINING THE PENAL NATURE OF A STATUTE.

1. The Standard Judicial Inquiry in Cases Involving Constitutional Protections Goes Beyond Congressional Labels.

Alexander Hamilton, in Federalist Paper No. 78, observed that "the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." In order to fulfill this function, the courts, in reviewing statutory enactments in light of the Constitution's protections of the people's rights, have never considered themselves bound by Congress' own description of its actions. *In re Gault,* 387 U.S. 1, 50 (1967); *United States v. Constantine,* 296 U.S. 568, 572 (1931). To grant such deference to congressional labels would vest the "improper

[10]Although the statutory scheme involved in this case is unique, there is no guarantee that it may not be expanded to other areas of regulation, given its advantages to the government. For one description of another possible use, *see United States v. LeBeouf Bros. Towing Co.,* 377 F. Supp. 558 (E.D. La. 1974), *rev'd.,* 537 F.2d 149 (5th Cir. 1976).

and dangerous power in the legislature" to make that which is wrong, right simply by so labeling it. *Cf. Powell v. McCormack,* 395 U.S. 486, 531 (1969). For this reason, the courts, in cases with constitutional implications, have searched for the substance behind the form.

This principle has a twofold application in this case. First, the term "criminal case" within the meaning of the Fifth Amendment privilege has not been limited by the courts simply to those proceedings in which the laws Congress has labeled as criminal are enforced.[11] Second, the courts have not held themselves bound by the fact that Congress has deliberately labeled as civil a sanction which is punitive in nature.[12]

2. The Standard Judicial Inquiry into the Penal Nature of a Statute Focuses Primarily on the Purpose of the Statute.

When statutes have been challenged in light of the due process clause, the double jeopardy clause, and the prohibitions against bills of attainder, ex post facto laws, and cruel and unusual punishment, among other constitutional provisions, the courts have often needed to determine whether or not a statute was penal in nature. As the Court in *Rex Trailer Co. v. United States,* 350 U.S. 148, 150 (1956), explained its inquiry in determining the application of the double jeopardy clause: "The only question for our decision, then, is whether §26(b)(1) is civil or penal." Similarly, the Court in *Stockwell v. United States,* 13 Wall. 531, 546 (1871), explained the test it used to determine whether an action had

[11]The Fifth Amendment privilege against self-incrimination has been held applicable to proceedings before a grand jury, *Counselman v. Hitchcock,* 142 U.S. 547 (1892); to civil proceedings, *McCarty v. Arndstein,* 266 U.S. 39 (1924); to police custodial interrogations, *Miranda v. Arizona,* 384 U.S. 426 (1966); to juvenile proceedings, *In re Gault,* 387 U.S. 1 (1967); to congressional investigations, *Watkins v. United States,* 354 U.S. 178 (1957); and to other statutory inquiries, *Malloy v. Hogan,* 378 U.S. 1 (1964).

[12]*See In re Gault,* 387 U.S. 1, 49 (1967); *Trop v. Dulles,* 356 U.S. 86, 94 (1958), *United States v. Constantine,* 296 U.S. 287, 294 (1935); *United States v. La Franca,* 423 F. Supp. 1352 (W.D. Okla. 1976).

to be brought by criminal indictment: "It becomes, then, material to consider the nature and purposes of the statute under which it is claimed the liability of the defendants has arisen. Is it strictly punitive, or is it remedial?" Likewise, in *Trop v. Dulles,* 356 U.S. 86, 96 (1958), the Court described a similar test: "Each time a statute has been challenged as being in conflict with the constitutional prohibitions against bills of attainder and ex post facto laws, it has been necessary to determine whether a penal law was involved. . . ." For other examples of inquiries into the penal nature of statutes, *see generally Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 164 (1963) (due process and trial by jury); *Flemming v. Nestor,* 363 U.S. 603, 613-614 (1960) (due process); *United States v. Lovett,* 328 U.S. 303 (1946) (ex post facto law); *Helvering v. Mitchell,* 303 U.S. 391, 398-399 (1938) (double jeopardy); *United States v. La Franca,* 282 U.S. 568, 572 (1931) (double jeopardy); *Lipke v. Lederer,* 259 U.S. 557, 562 (1922) (due process clause); *United States v. Chouteau,* 102 U.S. 603, 611 (1880) (double jeopardy); *Calder v. Bull,* (U.S.) 3 Dall. 386, 1 L. Ed. 648 (1798) (bill of attainder).

The inquiry for determining whether or not a statute is penal is plainly stated in *Trop v. Dulles, supra* at 96:

> In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment — that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.

The objective of the standard judicial inquiry is to determine whether Congress' *purpose* in enacting the statute was punitive.

*a. TO DETERMINE ACCURATELY WHETHER THE PURPOSE OF A STATUTE IS TO PUNISH, ALL THE POSSIBLE PURPOSES FOR THE STATUTE MUST BE CHARACTERIZED IN UNAMBIGUOUSLY PUNITIVE OR NONPUNITIVE TERMS.

As the above analysis from *Trop v. Dulles* shows, the punitive purpose of a statute can be proven or disproven *directly* by showing a congressional intent to punish. Alternatively, it can be proven or disproven *indirectly* by showing a nonpunitive congressional purpose; the logical inference being that if the purpose is nonpunitive, it cannot also be punitive. It is the indirect proof which is most often misapplied. The inference that the proof of "A" disproves "Z" is correct only if "A" and "Z" are mutually exclusive. So long as the inquiry is framed in terms of punitive vs. nonpunitive intent, the indirect proof is probative. However, the inquiry is usually framed by the courts in terms of "criminal vs. civil," *see, e.g., Hepner v. United States,* 213 U.S. 103, 112 (1909); *Stockwell v. United States,* 13 Wall. 531, 542-3 (1871); "punitive vs. regulatory," *see, e.g., United States v. Marathon Pipeline Co.,* 589 F.2d 1305, 1308 n.11 (7th Cir. 1978); *United States v. Tex-Tow Inc.,* 589 F.2d 1310, 1315 (7th Cir. 1978); or "punitive vs. remedial," *see, e.g., United States ex rel. Marcus v. Hess,* 317 U.S. 537, 549 (1943); *Helvering v. Mitchell,* 303 U.S. 391, 399-400 (1938). This type of framing of the inquiry does not confuse the issue *as long as* the term "criminal" is defined in punitive terms and the terms "civil," "regulatory," and "remedial" are defined in nonpunitive terms.

But it is little more than a verbal shell game to argue that a proceeding is "civil" if punitive ends are pursued therein, to argue that a statute is "regulatory" if it is enforced by punitive sanctions, or to argue that a statute is "remedial," in the sense of beneficial, when the criminal laws can be similarly described. Only if the terms "civil," "regulatory," and "remedial" are defined in a nonpunitive manner are they useful in determining punitive intent. Therefore, it seems useful to set out the basic nonpunitive definitions of "civil," "regulatory," and "remedial," to distinguish other possible definitions, and to examine the use of these terms in the Government's brief.

"Civil:" In its broadest sense, "civil case" refers to all cases both at law and at equity which cannot legally be denominated criminal cases. *See Fenstermacher v. State,* 19 Or. 504, 25 P. 142 (1890); *Welford v. Harvard,* 127 Miss. 83, 89 So. 812, 813 (1921); Black's Law Dictionary 222 (5th ed.

1979). And, as has been recognized by this Court, proceedings which are "civil" in form may be punitive in nature. *See Boyd v. United States,* 116 U.S. 616, 634 (1886); *United States v. United States Coin & Currency,* 401 U.S. 715, 718 (1971). *See also* Justice Frankfurter's concurring opinion in *United States ex rel. Marcus v. Hess,* 317 U.S. 537, 554 (1943). The punitive-nonpunitive ambiguity in the word "civil" results largely from the fact that courts have used the term "civil" to describe those proceedings in which certain procedural rules did not need to be followed, rather than to describe cases in which no punitive sanctions were enforced. *See* the analysis at 19, *infra*. For example, this Court has long held that an action for debt was maintainable in a "civil proceeding" so long as a fixed sum was involved, *regardless* of the purpose for which the sum was imposed. *See, e.g., Hepner v. United States,* 213 U.S. 103 (1909); *Oceanic Steam Navigation Co. v. Stranahan,* 217 U.S. 320 (1909). For the purpose of determining the penal nature of a statute, the ambiguous term "civil" should be discarded and replaced by the word "compensation" which reflects the usual nonpunitive purpose of civil proceedings. "Compensation" is defined by Black's Law Dictionary 256 (5th ed. 1979) as:

> An act which a court orders to be done, or money which a court or other tribunal orders to be paid, by a person whose acts or omissions have caused loss or injury to another, in order that thereby the person damnified may receive equal value for his loss, or be made whole in respect of his injury. *Hughson Condensed Milk Co. v. State Board of Equalization,* 23 Cal.App.2d 281, 73 P.2d 290, 292.

It should be noted that the Government frames its entire brief in terms of the §311(b)(6) penalty being "civil," without ever defining the term. Gov't Brief at I-II, 26-48. The Government's broad use of the term suggests that it is not restricting its meaning to a compensatory intent. This introduces considerable ambiguity into its conclusions.

"Regulatory:" The term "regulatory," in its broadest governmental sense, has come to mean all statutes enacted and

all regulations promulgated by the government to govern the conduct of members of the public in their occupations and everyday activities, other than those statutes which make up the criminal laws. While statutes establishing regulatory standards may not be punitive in their nature, if those standards are enforced by sanctions against violators, the sanctions themselves are punitive. This point is well made in *Trop v. Dulles,* 356 U.S. 86, 97 (1957):

> It is urged that this statute is not a penal law, but a regulatory provision authorized by the war power. It cannot be denied that Congress has the power to prescribe rules governing the proper performance of military obligations, of which perhaps the most hazardous is the performance of one's duty when hazardous or important service is required. *But a statute that prescribes the consequences that will befall one who fails to abide by these regulatory provisions is a penal law.* (emphasis added)

The same logic is reflected in this Court's observation in *Bailey v. Drexel Furniture Co. (Child Labor Tax Case)* 259 U.S. 20, 38 (1922), that when a "tax" is imbued with punitive purposes, "it loses its character as [a tax] and becomes a mere penalty with the characteristics of regulation and punishment."

It is impossible to find any intrinsic difference between the violation of a regulation and a crime when crimes are defined generally as "acts committed, or omitted, in violation of a public law forbidding or commanding them." *Schick v. United States,* 195 U.S. 65, 69 (1904); *United States v. Eaton,* 144 U.S. 677, 687 (1892). In effect, the criminal laws can be defined simply as a set of rules enacted for the purpose of regulating certain conduct of members of the public. It is the sanctions which are used to enforce both criminal laws and regulations which are punitive in nature. On the basis of these definitions, it is virtually impossible to distinguish most regulatory sanctions from criminal ones.

The Government in its brief at 40 refers to "essentially

regulatory deterrence," another ambiguous term. It would seem that if Congress' *purpose,* as described by the Government, was to promote deterrence of violations of §311(b)(3), then Congress must have intended the §311(b)(6) penalty to operate as a punishment; for it is punishment, no matter how mild or harsh, which promotes deterrence.

There are certain instances, however, in which the government can regulate without the use of punitive sanctions to enforce its regulations. These instances all involve affirmative disabilities and restraints. In such instances, the government may be able to regulate privileged occupations or franchises, as opposed to the conduct of individuals, by the nonpunitive use of affirmative disabilities. These regulatory purposes will be referred to as "nonpunitive regulatory" purposes for the sake of comparison with "punitive regulatory" purposes. Nonpunitive regulation through affirmative disabilities and restraints is discussed in much greater detail *infra* at page 36.

"Remedial:" Black's Law Dictionary 1162 (5th ed. 1979) defines a remedial action as "one which is brought to obtain compensation or indemnity, *Cummings v. Board of Education of Oklahoma City,* 190 Okla. 553, 125 P.2d 989, 994 (1942)." *See also Rex Trailer Co. v. United States,* 350 U.S. 149, 152 (1956); *United States ex rel. Marcus v. Hess,* 317 U.S. 537, 548-49 (1943). But the Government uses the term "remedial" in a much broader sense, as almost synonymous with the word "beneficial," which does not necessarily mean "nonpunitive." For example, the Government refers to the FWPCA's "broad remedial purpose to maintain the integrity of the nation's waters" (Gov't Brief at 17), and to the "remedial purposes of preventing discharges" (Gov't Brief at 33). In this sense, the punishment of criminals can certainly be said to have the remedial purpose of improving the quality and safety of our society.

In the remainder of the brief, the inquiry into Congress' purpose in enacting §311(b)(6) is described in punitive or nonpunitive terms. The word "compensation" is used instead of "civil" or "remedial" to refer to the purpose of obtaining redress for injuries. The purpose of collecting administrative

costs is referred to simply by that description.

b. TO DETERMINE ACCURATELY WHETHER THE PURPOSE OF A STATUTE WAS TO PUNISH, NO RELIANCE SHOULD BE PLACED ON THAT SERIES OF CASES WHICH DID NOT FOCUS ON THE PURPOSE OF THE STATUTE BUT RATHER FOCUSED ON THE IMPORTANCE OF CONSTITUTIONAL PROTECTIONS NOT AT ISSUE IN THIS CASE.

It must not be overlooked that the inquiry into the punitive purpose of the sanction is not the only test which the courts have applied in determining whether constitutional provisions are called into play by certain statutes. As this Court noted in *Helvering v. Mitchell,* 303 U.S. 391, 400 n. 3 (1938):

> The distinction here taken between sanctions that are remedial and those that are punitive has not generally been specifically enunciated. In determining whether particular rules of criminal procedure are applicable to civil actions to enforce sanctions, the cases have usually attempted to distinguish between the type of procedural rule involved rather than the kind of sanction being enforced.

The recognition that the Court has used different tests in determining the applicability of a constitutional provision is an important one because cases which focused on the procedural rule involved as opposed to the purpose of the sanction, in determining the applicability of a constitutional provision, are generally not relevant to an inquiry into the penal nature of a sanction.[13] The assumption cannot properly be made that

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[13]It is for this reason, and no other, that this Court's decisions which involved compelled testimony in "civil" proceedings, [*see, e.g., Boyd v. United States,* 116 U.S. 616 (1886); *Lees v. United States,* 150 U.S. 876 (1893); *United States v. United States Coin & Currency,* 401 U.S. 715 (1971)], are not particularly helpful in analyzing the case at bar. In *Boyd,* which was the seminal case, it is clear that what the Court was focusing on was the nature of the constitutional protection, namely the values of the Fifth Amendment privilege, and not the nature of the sanction. The nature of the sanction was never really addressed as such, but the Court clearly viewed it as "criminal." This view apparently came from the Court's observation, cited in the Government's Brief at 50-51, that the forfeiture imposed on Boyd could have been accomplished either by criminal indictment or civil proceeding — the inference being that the form of the

because a court held that a particular procedural rule required by the Constitution in criminal cases was not applicable in a proceeding to enforce a statutory sanction, based on its assessment of the importance of the procedural rule, the sanction which was being enforced was not punitive. Such a conclusion is simply beyond the pale of the courts' conclusions in those cases. *See, e.g., United States v. Regan,* 232 U.S. 37 (1914); *Hepner v. United States,* 213 U.S. 103 (1909); *Oceanic Steam Navigation Co. v. Stranahan,* 214 U.S. 320 (1909). And since the focus of those cases was on the need to protect the values of constitutional provisions other than the Fifth Amendment,[14] those cases are not relevant to the case at bar in any way.

This distinction between those cases which truly focused on the purpose of the sanction and those which simply focused on the constitutional protection involved is often overlooked by the Government in its brief. For example, after arguing that Congress must be aware of both the procedural distinction between criminal and civil sanctions and "the vastly different

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proceeding alone should not determine the application of the privilege. The Government's attempt to distinguish *Boyd, Lees,* and *United States Coin & Currency* from the present proceeding is flawed by its failure to understand what the Court does and does not do in *Boyd. Boyd* does not say that the Fifth Amendment privilege only applies when "civil" penalties are imposed for *criminal* offenses. For the Government to take the position that *Boyd* is distinguishable from the present case because the violation of §311(b)(3) is not a crime is inconsistent with the rest of its brief. If the only relevant factor in determining whether the intent of a statute is punitive is whether or not the penalty is imposed for a *criminal* offense, then congressional labels decide the case. The Government obviously does not believe this is a controlling test or else it should have concluded that the only important *Mendoza-Martinez* factor was the one which focued on whether or not the behavior to which the sanction applied is a crime and ignored all the other factors.

[14]The values protected by the Fifth Amendment privilege have been much more heavily emphasized by this Court than the values underlying many other constitutional protections. The Fifth Amendment privilege against self-incrimination has been described as "one of the great landmarks in man's struggle to make himself civilized," *Ullman v. United States,* 350 U.S. 422 (1956) and as "the essential mainstay of our adversary system," *Miranda v. Arizona,* 384 U.S. 436, 460 (1966). Because of the importance of the privilege, it is a general rule that it is to be liberally construed.

legal and societal consequences," the Government continues:

> For this reason, as Judge Friendly stated, "[w]hen Congress has characterized the remedy as civil and the only consequence of a judgment for the Government is a money penalty, the courts have taken Congress as its word." *United States v. J.B. Williams Co.,* 498 F.2d 414, 421 (2d Cir. 1974). Gov't Brief at 28.

To the extent that the Government intends that this Court follow the analysis of Judge Friendly and conclude that because §311(b)(6) imposes a monetary "civil" penalty it is not criminal/punitive for purposes of the Fifth Amendment privilege, it is only necessary to cite portions of the court's opinion which follow the portion cited to show that that analysis is inapposite here.

> While Congress could not permissibly undermine constitutional protections simply by appending the "civil" label to traditionally criminal provisions, the statute here at issue is plainly not of that class. In the face of a long line of contrary authority, appellants have not directed our attention to any civil penalty provision that has been held sufficiently "criminal" in nature *to invoke the protections of the Sixth Amendment.* (emphasis added) (footnote omitted) *United States v. J. B. Williams Co.,* 498 F. 2d 414, 421 (2d Cir. 1974).

This is only one of many examples in the Government's brief of the inaccuracy and confusion which result from relying on cases which focused on the nature of the constitutional protection involved, in trying to determine whether or not the purpose of a sanction is punitive.

3. The Indicators Relevant to Determining Whether the Purpose of a Statute Is to Punish Are Statutory Language, Legislative History, Statutory Context, and the *Mendoza-Martinez* Factors.

In determining whether Congress' purpose in enacting a statute was to punish, the courts have examined a variety of indicators. The most direct indicators are statutory language, legislative history, and statutory context. When those have not been conclusive, the courts have turned to other less direct indicators such as the factors set forth by this Court in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168 (1963) [hereinafter referred to as "the *Mendoza-Martinez* factors"], set forth *infra* at 29.

B. APPLYING THE STANDARD JUDICIAL INQUIRY USED IN DETERMINING THE PENAL NATURE OF A STATUTE TO THE FACTS OF THE CASE.

A congressional intent to punish those individuals and companies who discharge oil into navigable waters by the imposition of the §311(b)(6) penalty is clearly reflected in the statutory language and context of §311(b)(6), the legislative history of penalties similar to §311(b)(6) and the conclusion dictated by the proper application of the *Mendoza-Martinez* factors.

1. The Language of §311(b)(6) Indicates a Punitive Intent.

It is significant that the monetary exaction provided for by §311(b)(6) is labeled by Congress as a penalty.[15] The standard

[15]It is interesting to note that many of the statutes imposing monetary sanctions which the courts have been asked to review to determine whether or not they were penal in nature have been neutral on their face, using terms like "sums," "damages," or "taxes." *See Rex Trailer Co. v. United States,* 350 U.S. 148, 148 n.1 (1956) ("shall pay . . . the sum . . . ."); *Helvering v. Mitchell,* 303 U.S. 391, 395 (1938) ("50 per centum of the total amount of the deficiency . . . shall be so assessed, collected and paid . . . ."); *United States v. Constantine,* 296 U.S. 287, 289 n.1 (1935) ("a special excise tax"); *Lipke v. Lederer,* 259 U.S. 557, 561 (1922) ("a tax shall be assessed"); *Bailey v. Drexel Furniture Co.* (Child Labor Tax Case), 259 U.S. 20, 35 (1922) ("shall pay . . . in addition to all other taxes . . . an excise tax . . . ."); *Lees v. United States,* 150 U.S. 476, 478 (1893) ("for every violation, the offender shall forfeit and pay for every such offense . . . ."); *Stockwell v. United States,* 13 Wall. 531, 533 (1871) ("pay a sum double the amount or value of the goods . . . ."). The affirmative disability or restraint cases also involved statutes which were neutral on their face. *See, e.g.,* cases cited in section II(B)(4)(e), *infra* at 36.

definition of "penalty" is: "A punishment; a punishment imposed by statute as a consequence of a commission of an offense. Also money recoverable by virtue of a statute imposing a payment by way of punishment." Black's Law Dictionary 1020 (5th ed. 1979). *See also United States v. La Franca,* 282 U.S. 568, 573 (1931); *United States v. Chouteau,* 102 U.S. 603, 611 (1880). The §311(b)(6) penalty is a monetary exaction levied as a consequence of the commission of an offense,[16] namely the prohibited discharge of oil into navigable waters, and the fact that Congress called it a penalty suggests that Congress' purpose was to punish such offenses. For, to borrow the Government's logic, it must be presumed that Congress *knew* that the term "penalty" meant punishment and used it advisedly. Gov't Brief at 27-28. Moreover, if Congress' true purpose in enacting the §311(b)(6) penalty was to obtain compensation for damages to navigable waters or indemnity for administrative costs, it seems that Congress would have used a much more descriptive label such as "liquidated damages" or "fees and costs" to describe the monetary exaction.

The fact that the word "civil" describes the word "penalty" does not deny the existence of a punitive intent. The word "civil" is ambiguous with respect to a punitive vs. nonpunitive meaning. *See* section II(A)(2)(a) *supra* at 14. Congress' use of the term "civil" may simply reflect Congress' intent that the penalty be assessable by an administrative agency and be collectable through a civil proceeding, without reflecting anything about Congress' *purpose* in imposing the penalty. *See,e.g., Hepner v. United States,* 213 U.S. 103 (1909); *Oceanic Steam Navigation Co. v. Stranahan,* 214 U.S. 320 (1909); and *Boyd v. United States,* 116 U.S. 616 (1886). *See also* section II(A)(2)(b) *supra* at 19.

On balance, it is the word "penalty" which indicates a punitive intent, whether or not it is modified by the word "civil," which most clearly reflects Congress' purpose.

[16]Section §311(b)(6) specifically describes the violation of §311(b)(3) as an "offense." *See* note 4, *supra* at 3 .

2. The Legislative History of Statutory Sections Which Are Similar to §311(b)(6) Indicates a Punitive Intent.

There does not appear to be any legislative history specifically addressed to §311(b)(6). However, §§311(b)(2)(B)(ii) and 311(b)(2)(B)(iii) (Pet. App. at 38a-39a) also impose civil penalties[17] which the Government finds analogous to the penalty imposed by §311(b)(6). Gov't Brief at 24 n.18. The legislative history of these sections would appear applicable to §311(b)(6). *See United States v. Eureka Pipeline Co.*, 401 F. Supp. 934, 939 (N.D. W.Va. 1975).

The Senate committee which considered the 1972 amendments to the Federal Water Pollution Control Act described the purpose of §§311(b)(2)(B)(ii) and 311(b)(2)(B)(iii) as follows:

> The committee believes that the discharge of such substances should be subject to penalty even though cleanup is not practicable. In this way, each carrier or handler evaluates the risk of discharge and determines whether or not the potential penalty is worth the risk. Pub. L. No. 92-500, Section 311, *reprinted in* [1972] U.S. Code Cong. & Ad. News 3732.

Clearly the committee hoped that the existence of the penalty provision would deter carriers and handlers not just from intentionally discharging such substances and from conducting their business in a negligent manner, but also from operating their business in less than a completely careful way. There can be little doubt that the purpose of §311(b)(6), like the purpose of §§311(b)(2)(B)(ii) and 311(b)(2)(B)(iii), is to deter that conduct which results in oil spills.

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[17]In light of the Government's certainty that Congress used the word "civil" advisedly to describe the §311(b)(6) penalty (Gov't Brief at 27, 28), it is interesting to note that the §311(b)(2)(B)(ii) penalty is described as a "civil penalty" while the §311(b)(2)(B)(iii) penalty is described simply as a "penalty." A reading of §311(b)(2)(B)(ii) and §311(b)(2)(B)(iii) does not reveal any difference in the purposes of the penalties.

It seems almost axiomatic that the only ways a government can directly affect whether or not a person takes a certain action are to reward desirable actions and to punish prohibited ones. Since Congress' objective in enacting §311(b)(6) was to deter persons from spilling oil, it seems unquestionable that Congress intended that the penalty operate *as a punishment* on those persons who might spill oil. That is punitive intent.

3. The Statutory and Administrative Factors on Which the §311(b)(6) Penalty Is Assessed Indicate a Punitive Intent.

The different statutory and administrative factors on which assessment of the §311(b)(6) penalty is based also indicate, both directly and indirectly, that Congress' intent was punitive. These factors are consistent with a punitive purpose, and they are, by and large, inconsistent with all of the suggested nonpunitive purposes.

Section §311(b)(6) directs the Secretary to consider the following factors in assessing the penalty "[T]he appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation." Instruction 5922.11B, issued by the Commandant of the Coast Guard on October 10, 1974, expounds on the statutory factors.[18] Section C of that instruction lists the factors to be considered in determining the

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[18]The amici are responsible for the fact that the Tenth Circuit Court of Appeals relied on Coast Guard Instruction 5922.11A, rather than Coast Guard Instruction 5922.11B. Since the parties had not cited any Coast Guard instructions and the amici felt they were important, the amici set out, in their brief, Coast Guard Instruction 5922.11A which had been attached as the appendix to *United States v. LeBeouf Bros. Towing Co.*, 377 F. Supp. 558 (E.D. La. 1974), *rev'd*, 537 F.2d 149 (5th Cir. 1976). Although in oral argument the amici brought the Instruction to the court's attention and it was the subject of numerous inquiries by the court, the Government did not at that time, or subsequent to the argument, bring the Instruction actually in effect at the time of the case to the court's attention. As the Government noted, the differences between the instructions are largely matters of form. Gov't Brief at 11 n.8.

gravity of the violation:

(1) Was the discharge intentional?
(2) Could the discharge have been prevented using reasonable care?
(3) Was the discharge caused by an act or omission of a type previously attributable (according to official records) to that same owner/operator so as to place him on notice of the particular hazard?
(4) Was the cause of the discharge a violation of the prevention regulations? Note that a *separate* violation may have occurred under Section 311(j).
(5) Did the owner/operator take special steps to try to avert the specific discharge?
(6) Was the discharge "unforseeable" [sic] by an experienced owner/owner [sic] knowing the weather, sea conditions and equipment?
(7) Was there a minimum amount of oil discharged? Gov't Brief at 2a, 3a.

Taken all together, these factors indicate an intent to punish rather than a congressional intent to recover compensation for irremediable damages to navigable waters or to recover the administrative costs placed on the system by the oil spill as suggested by the Government. Gov't Brief at 33, 40, 45, 46.

The two purposes of punishment are deterrence and retribution. Consideration of the appropriateness of a penalty to the size of the business and the effect of the penalty on the business's finances appears relevant to deterrence in the following way. The Coast Guard is the judge and jury in assessing the penalty. Congress has simply given the Coast Guard the latitude to assess a penalty which is sizable enough to have a deterrent impact on each particular violator but not large enough to drive any particular company out of business. Although Section D of Coast Guard Instruction 5922.11B indicates that the basic objective in considering the size of the business is to avoid bankrupting the violator (Gov't Brief at 4a), the "relative deterrence" thinking outlined above is not absent from the Coast Guard Instruction. Section E states:

> If the facts warrant the imposition of a minimum penalty, then the penalty should be reasonably sufficient to motivate owners and operators of vessels and facilities to take adequate measures to prevent future unlawful discharges. In a district where pollution incidents are somewhat controlled, a figure of $150.00 per incident might be adequate to provide the necessary motivation. In another district where violations are flagrant and preventative measures frequently disregarded, a somewhat higher minimum figure might be required to provide the same motivation. Gov't Brief at 5a.

The "gravity of the violation" factor, especially as the Coast Guard defines it, would seem particularly critical to deterrence. The Coast Guard assesses the facts of each case in an effort to determine whether the spill occurred as a result of the intentional conduct, the negligent conduct, or simply the less than totally careful conduct of the owner/operator. The penalty is scaled upwards the more responsible the owner/operator is for the occurrence of the spill. Consideration of the gravity of the spill reflects the adage that the punishment should fit the crime, with flagrant intentional violations being punished more severely than negligent or other violations. The keying of the size of the penalty to the intentional conduct of the violator also indicates a retributive purpose in punishing more harshly those who flagrantly violate the law. All the factors on which the penalty is assessed are perfectly consistent with a punitive purpose.

The analysis of the assessment factors in light of the alternate purposes suggested for the penalty, specifically compensation to the government for irremediable damages to navigable waters or compensation for administrative costs, shows that the factors are much less reasonably related to those purposes than to a punitive purpose. It would seem that neither the size of the business nor the effect of the penalty on the business is relevant to determining the amount of irremediable damage to navigable waters or the administrative costs of investigating a violation in any particular case. At best, these factors are neutral, showing that Congress did not intend §311(b)(6) to bankrupt anyone.

The determination of the gravity of the violation, according to the Coast Guard's criteria, also does not relate strongly to either of these two compensatory purposes. It does not seem necessary to determine the motivation of the violator in order to determine the extent of the irremediable harm suffered by the government. The only factor which the Coast Guard considers which might be relevant to irremediable harm is factor number (7). Notably, however, that consideration is specifically limited to the question of whether there was a "minimum amount" of oil discharged. Moreover, any cleanup efforts undertaken by the violator, which would seem to be relevant to the question of how much of the damage suffered by the government was irremediable, is specifically excluded from consideration. Pet. App. at 2a

Similarly, the gravity of the violation, as determined by the Coast Guard, would not appear to relate to the administrative costs placed on the government by a particular spill. Likewise, the fact that the penalty funds are used, in small part, to cover administrative costs does not convincingly indicate that this was the main reason the funds were collected in the first instance. If the government's primary purpose was to shift the burden of cleaning up water pollution from the public to industry, it could have done so much more easily and fairly by placing an occupation or special tax on all members of the industry. This suggests that recovering administrative costs was, at most, a secondary purpose to deterrence.

The relationship (or lack thereof) between the assessment factors and a congressional purpose should not be casually disregarded. While the courts may be free to assume that it was administrative convenience which dictated the establishment of a statutorily fixed sum to cover damages not easily assessed and to cover administrative costs, *see, e.g., One Lot Emerald Cut Stones v. United States,* 409 U.S. 232 (1972), when Congress and the administrative agency actually provide for a different penalty to be assessed in each instance, based on specific factors, those factors must be perceived as indicating why Congress imposed the penalty in the first place. The factors on which the §311(b)(6) penalty is based indicate a punitive purpose.

4. The Application of the *Mendoza-Martinez* Factors to the Facts of the Present Case Indicates a Punitive Intent.

In *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963), the Court set out a list summarizing those factors which it had previously used in different cases "to determine whether an act of Congress is penal or regulatory in character." [19] Those factors are:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. *Id.* at 168. (footnotes omitted)

The *Mendoza-Martinez* factors can be useful indicators of congressional intent when more direct indicators are inconclusive, as long as they are thoughtfully applied and are not applied in a mechanical fashion simply to reach a conclusion.

Because a number of lower courts have addressed the question of Congress' intent in enacting §311(b)(6) and have applied the *Mendoza-Martinez* factors, this provides a unique opportunity to compare how different courts have applied the same analysis to the same facts. *See Ward v. Coleman,* 598 F.2d 1187 (10th Cir. 1979); *United States v. General Motors Corp.,* 403 F. Supp. 1151 (D. Conn. 1975); *United States v.*

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[19]The "regulatory" character of an act refers only to those true nonpunitive regulatory purposes associated with affirmative disabilities or restraints, namely the regulatory purpose of setting standards for the enjoyment of privileges or franchises. *See* section II(B)(4)(e), *infra* at 36.

LeBeouf Bros. Towing Co., 377 F. Supp. 558 (E.D. La. 1974); *Ward v. Coleman*, 423 F. Supp. 1352 (W.D. Okla. 1976); *United States v. Eureka Pipeline Co.*, 401 F. Supp. 934 (N.D. W. Va. 1975) [hereinafter "the §311(b)(6) cases"]. To facilitate the comparison of the §311(b)(6) cases, the amici have prepared an appendix to this brief [hereinafter "Amici App."] which sets out, in columns, each court's application of the *Mendoza-Martinez* factors to the facts of the case, the inferences drawn by each court from its factual conclusions, and the reasoning each court used to justify its inferences. The Government's brief is similarly analyzed and presented in the Appendix.

The Appendix reveals a number of interesting insights into the nature of the *Mendoza-Martinez* factors and their application. In each of the §311(b)(6) cases, the court's stated objective was generally to determine whether or not Congress' intent in enacting §311(b)(6) was or was not punitive. It would seem that if the courts were all trying to determine the congressional intent behind §311(b)(6) they should all have come to the same conclusion. After all, Congress' intent was either punitive or it was not. But instead, the courts' final conclusions differed widely. Two courts concluded that Congress' intent was "civil" and "remedial." *See* Amici App., *United States v. General Motors Corp.*, and *Ward v. Coleman* (W.D. Okla.). Two courts concluded that Congress' intent was "punitive" or "criminal." *See* Amici App., *United States v. LeBeouf Bros. Towing Co.*, and *Ward v. Coleman* (10th Cir.). And one court found that the *Mendoza-Martinez* indicators were inconclusive in showing the congressional intent behind §311(b)(6). *See* Amici App., *United States v. Eureka Pipeline Co.* The best explanation for the inconsistency is that regardless of what the courts said they were doing, they were not limiting their inquiry simply to determining Congress' intent in enacting §311(b)(6). What they were really doing was deciding whether or not the §311(b)(6) penalty was "criminal" or "civil" for the purpose of applying the constitutional protection in the case before them.

Since the determination of Congress' intent in enacting §311(b)(6) is a matter of statutory construction, it should be

determinable without regard to the constitutional protection involved in each case. However, it clearly appears that each court's assessment of the importance of the constitutional protection at stake influenced its application of the *Mendoza-Martinez* factors. Both of the courts which found that Congress' intent was punitive did so in the context of the Fifth Amendment privilege against self-incrimination. *United States v. LeBeouf Bros. Towing Co.*, *supra* and *Ward v. Coleman* (10th Cir.), *supra*. (*LeBeouf Bros. Towing Co.* was later reversed because the court overlooked the fact that corporations are not entitled to the Fifth Amendment privilege.) The court which found that the factors were inconclusive in showing congressional intent and one of the two courts which found Congress' intent to be remedial did so in the context of procedural due process clause protections. The only decision which was not affected as one might have anticipated, by the fact that the Fifth Amendment privilege was involved, was the Oklahoma district court's decision in *Ward v. Coleman supra*. However, a review of that decision indicates that, unlike the Tenth Circuit in *Ward* and the court in *United States v. LeBeouf Bros. Towing Co.*, the Oklahoma court took a straight statutory construction approach to §311(b)(6) with little if any thought to the values or applicability of the Fifth Amendment privilege.[20]

The conclusion that the constitutional protections at stake significantly influence the courts' inquiry into Congress' purpose in enacting §311(b)(6) should not be surprising. After all, at times this Court has focused solely on the nature of the constitutional protection involved as opposed to the purpose of the sanction applied. *See* section II(B)(2)(b), *supra* at 19. The problem which arises from combining the two analyses is that although the courts have properly considered the values of the constitutional protections at stake and have probably reached the correct conclusions (except for the district court's decision in *Ward*), their analyses are often misleading because

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[20]It seems significant that Judge Eubanks unconditionally denied Ward's Motion to Convene a Three Judge Court, despite the Fifth Amendment privilege arguments raised by Ward, on the grounds that "no substantial challenge to the constitutionality of the statute was presented." Appendix at 2, 3. Pet. App. at 23a n.2.

they are framed simply in terms of determining the congressional intent behind §311(b)(6), while, in reality, they weigh the importance of the constitutional protection involved. Therefore, any use of the §311(b)(6) cases in the case at bar must be undertaken with this recognition of how the courts were actually analyzing the problem.

Several other general conclusions can be drawn from the Appendix. An overview of the "application" column shows that there is often disagreement among the courts even with respect to the application of the factors to the facts. The courts are unanimous only with respect to the application of factors 2, 3, 4 and 5, concluding that monetary penalties have historically been regarded as punishment, that the §311(b)(6) penalty comes into play only on a finding of scienter, that the §311(b)(6) penalty promotes deterrence, and that the behavior to which the penalty applies is already a crime. The lack of unanimity with respect to factor 1, the question of whether a monetary penalty is an affirmative disability, stems from the fact that some courts failed to understand the nature of an affirmative disability or restraint. The lack of unanimity in the application of factors 6 and 7, whether alternative purposes could be rationally assigned to the §311(b)(6) penalty and whether the amount of the penalty was excessive in relationship to such purposes, appears to stem from the fact that the decisions as to whether a purpose is "rationally related" and whether an amount is "excessive" involve value judgments which are affected by the subliminal weighing of the values of the constitutional protections.

A review of the "inference" column reveals that the inferences, even when drawn from the same factual applications, vary widely. The "reasoning" column often indicates why these differences exist, reflecting frequently imprecise uses of terms like "civil" and "remedial," and reflecting analyses which are not properly directed toward answering the question posed by the factual application. Often too, the variety of inferences drawn reflects the influence of each court's perception of the importance of the constitutional protection at stake. Finally, the Appendix clearly demonstrates that the *Mendoza-Martinez* factors can

be argued as showing almost any purpose. It is especially interesting that the Government manages to allege that certain factors indicate a remedial purpose even when none or few of the §311(b)(6) cases provide support for such an allegation.

Having generally criticized, analyzed, and reworked all the other applications of the *Mendoza-Martinez* factors to the §311(b)(6) penalty, the amici offer their own analysis of their application and the proper inferences to be drawn from them. In order to clarify the application of the *Mendoza-Martinez* factors, which appear to be listed randomly, the amici have found it helpful to group the factors according to whether they are more useful in indicating punitive or regulatory intent. Four of the seven *Mendoza-Martinez* factors are particularly relevant to the question of whether the intent is punitive or not; namely, whether the sanction has historically been regarded as a punishment, whether the sanction comes into play only on a finding of scienter, whether its operations will promote the traditional aims of punishment — retribution and deterrence, and whether the behavior to which it applies is already a crime. A "yes" answer to these factors indicates a punitive intent, in most cases, but some "yes" answers are inconclusive. A "no" answer may discredit the conclusion that the intent is punitive or may be virtually inconclusive. However, even though a "no" answer may strongly discredit punitive intent, it cannot be logically taken, in most cases, to indicate the existence of a compensatory or other nonpunitive intent.

The remaining three factors tend to be much more useful in either proving or disproving a nonpunitive intent; namely, whether the sanction involves an affirmative disability or restraint, whether an alternative purpose to which it may rationally be connected is assignable to it, and whether it appears excessive in relation to the alternate purpose assigned. With respect to these factors, a "yes" answer tends to indicate a nonpunitive intent. A "no" answer may discredit such a conclusion or be virtually inconclusive. Again, it cannot be assumed that a "no" answer to these factors indicates a punitive intent. Seldom, if ever, is the determination of any of the *Mendoza-Martinez* factors dispositive of the punitive-

nonpunitive inquiry.

a. THE FACT THAT A MONETARY PENALTY HAS HISTORICALLY BEEN REGARDED AS A PUNISHMENT IS AN INCONCLUSIVE INDICATOR.

The collection of a monetary penalty has historically been regarded as a punishment. However, the significance of this conclusion in indicating punitive intent is diminished by the fact that sums of money may be collected as damages, fees and costs, or taxes. Therefore, while a "no" answer to this factor would tend significantly to discredit the conclusion that the intent was punitive, a "yes" answer is generally inconclusive.

Comparing the §311(b)(6) cases (Amici App. column 2), the courts were unanimous in recognizing that a monetary penalty has historically been regarded as a punishment, but that because of its other possible purposes it is an inconclusive indicator. Only the Government, in its brief, argues that the fact that a monetary penalty is involved "clearly supports the remedial, noncriminal nature of the penalty provision." Gov't Brief at 37.

b. THE FACT THAT THE PENALTY OPERATES TO PROMOTE RETRIBUTION AND DETERRENCE CONFIRMS A PUNITIVE INTENT.

This factor focuses on whether the penalty actually promotes retribution and deterrence. Undoubtably it does, but the much more important fact is that direct indicators such as the legislative history and the assessment factors clearly show that Congress specifically *intended* that the penalty operate to promote deterrence. *See also* unanimity of §311(b)(6) cases and the Government on deterrent intent, Amici App. column 4.

The distinction between determining that a sanction operates to promote deterrence and determining that it was deliberately imposed for the purpose of promoting deterrence is important in the following way. If Congress' main purpose in enacting §311(b)(6) could somehow be shown to be to obtain compensation for irremediable inquiries to navigable waters, then any deterrent effect which the penalty might have could be discounted as incidental. But the fact that Congress' most important goal in the FWPCA was deterrence indicates that Congress' primary concern was with the impact that the penalty would have on the conduct of those subject to it and

not with the incidental monetary benefit to itself. This demonstrates a punitive purpose.

c. THE FACT THAT THE BEHAVIOR TO WHICH THE §311(b)(6) PENALTY APPLIES IS A CRIME INDICATES A PUNITIVE INTENT.

The discharge of oil from the shore into navigable waters is a crime under the Rivers and Harbors Act of 1899, 33 U.S.C. §§407, 411 (1976). *See* Amici App. column 5. The same conduct is also a violation of the §311(b)(3) prohibition, showing the lack of any intrinsic distinction between a "crime" and a regulatory "offense" in this case. Any distinction is simply one of labels. What Congress appears to have done in the FWPCA is to bar the use of the §311(b)(5) compelled report in "criminal cases," presumably those arising under the Rivers and Harbors Act, in order to avoid obvious constitutional problems. Then Congress turned right around and reenacted the Rivers and Harbors Act prohibition as §311(b)(3) of the FWPCA, making the same conduct again subject to penalty under §311(b)(6) but calling it a "civil" penalty so that the compelled reports could be used as the basis for assessing it.

While it is true that the §311(b)(6) penalty does not appear to be an *additional* punishment for a crime, the §311(b)(6) penalty does appear to be a substitute punishment for that offense. A "yes" answer to this factor weighs in favor of the conclusion that Congress' intent was punitive.

d. THE FACT THAT THERE IS NO SCIENTER REQUIREMENT FOR THE IMPOSITION OF THE §311(b)(6) PENALTY DOES NOT DISPROVE A PUNITIVE INTENT AND THE FACT THAT A SCIENTER REQUIREMENT IS INTRODUCED BY THE COAST GUARD IN ASSESSING THE PENALTY INDICATES A PUNITIVE INTENT.

The §311(b)(6) penalty is imposed on a strict liability basis. But the absence of a scienter requirement does not disprove the existence of a punitive intent since crimes too may be punished on a strict liability basis. As the Tenth Circuit Court of Appeals noted, the discharge of oil into navigable waters is a strict liability crime under the Rivers and Harbors Act. The absence of a scienter requirement simply shows that the punishment was intended to deter not just intentional or negligent conduct, but also to deter conduct which was less

than completely careful.

In assessing the amount of the penalty, the Coast Guard introduces a scienter requirement by considering whether the spill was intentional or accidental. Gov't Brief at 2a, 3a. Higher penalties are assessed for more flagrant violations, indicating a retributive and deterrent purpose.

Viewed as a whole, the punitive intent indicators support the conclusion that Congress' intent in enacting the §311(b)(6) penalty was to punish those individuals and companies who violated §311(b)(3) by discharging oil into navigable waters. No alternative nonpunitive purpose is shown by the following three nonpunitive intent indicators.

e. THE FACT THAT A MONETARY PENALTY IS NOT AN AFFIRMATIVE DISABILITY OR RESTRAINT CLEARLY DISPROVES A NONPUNITIVE REGULATORY INTENT.

Oddly enough, there seems to be considerable confusion about what an affirmative disability or restraint is and whether or not a monetary penalty is one. *See* Amici App. column 1, Application. *See, e.g., United States v. Eureka Pipeline Co.,* 401 F. Supp. 934, 939 (N.D. W.Va. 1975); *United States v. Futura,* 337 F. Supp. 162 (N.D. Fla. 1972). As the Court used the term in *Kennedy v. Mendoza-Martinez, supra,* an "affirmative disability or restraint" is the "taking away" from an individual some privilege to which he had previously been entitled or some status which he had previously held. Affirmative disabilities would include restrictions on the right to vote, *Murphy v. Ramsey,* 114 U.S. 15 (1885); restrictions on the right to practice a certain occupation, *Spevak v. Klein,* 385 U.S. 511 (1967) (disbarment of attorney); *United States v. Lovett,* 328 U.S. 303 (1946) (exclusion from government service); *Hawker v. New York,* 170 U.S. 189 (1898) (exclusion from practice of medicine); *Cummings v. Missouri,* 71 U.S. 277 (1866) (disability to conduct religious services); and restrictions on entitlement to government largess, *Flemming v. Nestor,* 363 U.S. 603 (1960). It seems obvious that the imposition of a monetary penalty does not involve the taking away of any privilege or status. Therefore the sanction involved in the present case is not an affirmative disability.

If a monetary penalty is a restraint at all, it is, as the Tenth Circuit Court has found, a negative as opposed to an affirmative restraint and it is a restraint only on the theory that a penalty will deter the objectionable conduct. *See Atlas Roofing Co. v. Occupational Safety & Health Review Commission,* 518 F.2d 990, 1001 (5th Cir. 1975). Although the Government properly analyzes what an affirmative disability is, it then proceeds to draw a completely incorrect conclusion from the absence of an affirmative disability in this case. The Government concludes that such absence distinctly points to a remedial as opposed to a punitive intent. Gov't Brief at 35, 37. At best, the absence of an affirmative disability is inconclusive in proving or disproving punitive intent. *See* Amici App. column 1, Inference.

The significance of this factor is that a "no" answer disproves, almost by definition, the kind of nonpunitive regulatory purpose which was contemplated by the Court in *Mendoza-Martinez. See Helvering v. Mitchell,* 303 U.S. 391, 399 (1938). This is true because *only* with an affirmative disability can it be shown that the government is seeking to regulate *something other than* the conduct allegedly being punished.

This conclusion can be demonstrated by examining the kind of analysis that the Court utilized in determining whether an affirmative disability or restraint could be justified by a nonpunitive regulatory purpose. As the Court stated in *Trop v. Dulles,* 356 U.S. 86, 96 (1957):

> The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But, because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, the law is sustained as a nonpenal exercise of the power to regulate the franchise.

If a disability is imposed on a person in order to protect a

privilege or franchise, then the restriction is regulatory. *See Mahler v. Eby,* 264 U.S. 32 (1924). The logic on which this conclusion is based is that the government has a right to set standards for the enjoyment of governmental privileges. If in establishing standards for a privilege — for example, the right to vote, or the right to practice law — the government excludes certain classes of people, especially persons who have committed some offense or other, it could be argued that such exclusion is necessary, not to punish those who are deprived of the privilege, but instead to protect that privilege from enjoyment by those who are unworthy of it. Furthermore, by establishing standards for the exercise of a privilege, the government protects the public from an exercise of the privilege by those whose fitness might be questionable. *See Mahler v. Eby, supra* at 39; *Hawker v. New York,* 170 U.S. 189, 196 (1898).

However, if an affirmative disability or restraint is imposed in order to punish (regulate) specific conduct, then it is punitive and not regulatory in the sense that the word "regulatory" is used in this factor. It must be understood, in comparing an affirmative disability with a monetary penalty, that a monetary penalty cannot ever be characterized as a "reasonable ground of eligibility" for a privilege and can only regulate by punishing specific conduct.

That an affirmative disability may have a regulatory purpose unconnected with specific conduct, whereas a monetary penalty cannot, is illustrated by the relationship between the disability or the penalty and the conduct allegedly being punished. A specific nonpunitive affirmative disability usually comes into play in connection with a wide variety of conduct. For example, a lawyer can be disbarred for any number of criminal activities, as long as they are felonies. In contrast, a specific monetary penalty applies to specific conduct. In the same vein, an affirmative disability does not always come into play when a certain action is taken. If both a lawyer and a nonlawyer commit felonies, the affirmative disability only applies to the lawyer. But a monetary penalty is exacted whenever the prohibited act occurs, regardless of who commits it. A monetary penalty when used to regulate is

clearly punishment for specific conduct.

In the present circumstance, the absence of an affirmative restraint disproves a nonpunitive regulatory purpose and is inconclusive with respect to a punitive purpose. The Government, in concluding that the absence of an affirmative disability or restraint signifies a remedial purpose, completely fails to recognize what this *Mendoza-Martinez* factor was intended to indicate.

f. ALTHOUGH ALTERNATE PURPOSES FOR THE §311(B)(6) PENALTY ARE CONCEIVABLE, THEY ARE NOT RATIONALLY RELATED TO IT, WHICH DISPROVES A NONPUNITIVE PURPOSE.

Undoubtedly, alternate nonpunitive purposes can be assigned to any monetary penalty by courts and lawyers. However, the focus of the *Mendoza-Martinez* factors and of the Court's inquiry in this case is not whether a particular sanction *could have been used* to achieve nonpunitive purposes, but instead whether Congress *intended* that it be used for those nonpunitive purposes. As this Court observed in *United States ex rel. Marcus v. Hess,* 317 U.S. 537, 542 (1943): "Sound rules of statutory interpretation exist to discover and not to direct the Congressional will." The requirement that the alternate purpose must be rationally connected to the penalty is important, especially in a case involving values as essential as those underlying the privilege against self-incrimination. It is not enough to find a nonpunitive purpose for a monetary penalty and make a plausible argument for it. It must be shown that the nonpunitive purpose advanced was actually the primary purpose intended by Congress.

First, to the extent that the Government is claiming a regulatory purpose of deterring the prohibited conduct of discharging oil into navigable waters, the Government has failed to demonstrate any mechanism, other than punishment, by which the Act could operate to promote such deterrence. Therefore, this argument does not prove a nonpunitive intent.

Second, the Government has failed to demonstrate any congressional intent that the §311(b)(6) penalty act as a measure of liquidated damages. The monetary assessment is defined as a penalty and not as liquidated damages. The

legislative history stresses deterrence, not compensation to the government, as the penalty's primary purpose. If the purpose of the penalty was simply to make the government whole for the oil spill, there should be no consideration of how the spill occurred or the intent of the violator, since those questions have no bearing at all on the degree of harm to the government and are inconsistent with the concept of absolute liability.

Finally, the Government has failed to show that the primary purpose of the §311(b)(6) penalty was to finance the costs of administering the FWPCA. Neither the language, statutory context, or legislative history support this conclusion. The fact that the funds collected from the penalty are placed in a revolving fund used to pay administrative costs and the costs of cleaning up spills when no responsible entity can be identified, cannot sustain the conclusion that such was the primary purpose for which the funds were collected in the first instance.

g. THE FACT THAT THE AMOUNT OF THE §311(B)(6) PENALTY IS ASSESSED ON THE BASIS OF FACTORS NOT REASONABLY RELATED TO THE SUGGESTED NONPUNITIVE PURPOSE DISPROVES A NONPUNITIVE INTENT.

Determining whether the penalty is "excessive" in relation to a suggested nonpunitive purpose requires a value judgment. It requires a court to determine the degree of disparity it will tolerate between the amount of money it views as necessary to satisfy the nonpunitive purpose and the amount of the penalty. In the present case, it would be possible for a court to determine that a penalty which has a maximum of $5,000.00 could never be excessive in relation to irremediable damages or administrative costs.

In order for this factor to be of somewhat more utility, it is helpful to reframe the factor, as this Court did in *Bell v. Wolfish*, 99 S. Ct. 1861, 1874 (1979), in terms of whether the amount of the penalty is "reasonably related" to the alternate purpose. Although the penalty imposed in a particular case might be reasonably related to a nonpunitive purpose, such as compensating the government for the irremediable effects of an oil spill or reimbursing the government for administrative costs, such reasonable relationship exists by accident and not

by design, since the assessment factors are not related to the suggested nonpunitive purposes. *See* section II(B)(3) *supra* at 25. It is just as likely that no reasonable relationship would exist. This tends to disprove the existence of the suggested nonpunitive purposes.

The *Mendoza-Martinez* factors which indicate a nonpunitive intent, taken collectively, fail to prove any nonpunitive purpose for the §311(b)(6) penalty. This conclusion, as well as the conclusions reached in examining the statutory language and context and the legislative history and the *Mendoza-Martinez* factors indicating punitive intent, demonstrates that the congressional intent in enacting §311(b)(6) was punitive.

III. EVEN IF THE COURT DOES NOT FIND THAT THE INDICATORS CONCLUSIVELY PROVE THAT CONGRESS' INTENT IN ENACTING §311(b)(6) WAS PUNITIVE, THE PRINCIPLE ESTABLISHED BY THIS COURT IN THE SELF-REPORTING CASES DICTATES THAT THE PRIVILEGE STILL BE GIVEN EFFECT IN THIS CASE.

It is at the conclusion of the standard judicial inquiry into the purposes of the penalty, and not before, that account should be taken of the nature of the constitutional protection involved. The standard judicial inquiry into the purpose of the §311(b)(6) penalty may yield one of three results: 1) Congress' purpose may be conclusively proved to be nonpunitive; 2) Congress' purpose may be conclusively proved to be punitive; or 3) the inquiry might produce, in varying degrees, an inconclusive result. In most cases, if the purpose of the penalty is unquestionably proven to be nonpunitive, the inquiry ends. *But see* amici's analysis of that potentiality occurring in the present case, section I, *supra* at 8. If the purpose of the penalty is clearly shown to be punitive, then at least for the purposes of the application of the Fifth Amendment privilege, the inquiry should end.[21] This was the

[21]For the purpose of other constitutional protections such as the procedural due process clause protections the inquiry might continue at

conclusion of the Tenth Circuit Court of Appeals in this case. But if this Court feels that the inquiry is not completely conclusive, then it is the principles dictated by the constitutional protection at stake which determine the outcome of the case.

When the facts of any case are inconclusive, it is the assignment of the burden of proof which ultimately determines the case. Therefore, the rule which determines where the burden of proof should lie must be carefully chosen and applied. The rules of construction adopted by those lower courts examining statutes in a due process or a statutory construction context, which permit congressional labels to resolve an inconclusive inquiry, are not appropriate in a Fifth Amendment privilege context.[22] The selection of an appropriate burden of proof rule should take into account the importance of the competing values. In this case, such a rule must take cognizance of the importance of the Fifth Amendment privilege against self-incrimination and the importance of the governmental interests involved. Guidance in balancing these two competing interests can be found in this Court's decisions which analyzed other self-reporting requirements in light of the Fifth Amendment privilege against self-incrimination. *See, e.g., California v. Byers,* 402 U.S. 424 (1971); *Marchetti v. United States,* 390 U.S. 39 (1968); *Grosso v. United States,* 390 U.S. 62 (1968); *Haynes v. United States,* 390 U.S. 85 (1968); *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965); *United States v. Sullivan,* 274 U.S. 259 (1927) ("the self-reporting cases").

A. THE SELF-REPORTING CASES ESTABLISHED THE PRINCIPLE THAT UNCERTAINTIES SHOULD, IN

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this point to determine whether the penalty was *sufficiently* punitive to demand the recognition of those protections.

[22]For example, in *United States v. Eureka Pipeline Co.,* 401 F. Supp. 934 (N.D. W. Va. 1975), the District Court for the Northern District of West Virginia chose to resolve doubts against finding that the penalty was punitive in nature on the basis that: "[U]nmistakable evidence of punitive intent is required before a congressional enactment of this kind may be struck down." *See also Atlas Roofing Co. v. Occupational Safety & Health Review Comm.,* 518 F.2d 990, 1011 (5th Cir. 1975); *United States v. J.B. Williams Co.,* 498 F.2d 411, 421 (2d Cir. 1974).

MOST INSTANCES, BE CONSTRUED IN FAVOR OF THE APPLICATION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION.

In the self-reporting cases, usually four of the five elements[23] necessary for the application of the Fifth Amendment privilege were unquestionably present. Typically, the facts of those cases indicated that a natural person was involved, evidence was compelled, the compelled evidence was testimonial in nature, and the sanction which might be imposed was unquestionably criminal. Therefore, the question which remained for the Court to resolve was the likelihood that the compelled evidence would lead to the criminal penalty.

The case at bar presents almost the same scenario, except that, in this case, the compelled evidence is unquestionably incriminating since the §311(b)(5) report is *designed* to lead to the imposition of the §311(b)(6) sanction, and the remaining issue is the likelihood that the §311(b)(6) penalty is punitive in nature. In the present instance, as in the self-reporting cases, the Court must deal with the question of how likely it is that a certain element necessary for the application of the privilege is present. Therefore, the same rules which were used in the self-reporting cases to resolve doubts as to whether the compelled evidence was "incriminating" are similarly applicable to this case in resolving doubts as to whether the congressional intent behind the penalty was punitive or not.

In the self-reporting cases, when the facts were not conclusive, the Court weighed the competing interests in determining whether the privilege should apply, with the greater weight being given to the application of the privilege. The cases were resolved in favor of the privilege where a substantial likelihood of incrimination could be shown. An analysis of the self-reporting cases supports these generalizations.

This Court has recognized that fundamental conflicts may arise between the Fifth Amendment privilege and the governmental interest in obtaining information. As it stated in

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[23]*See* note 5, *supra* at 7 n.6.

California v. Byers, 402 U.S. 424, 427 (1971):

> Tension between the State's demand for disclosure and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of a balancing of the public need on one hand and the individual's claim to constitutional protections on the other; neither interest can be treated lightly.

In balancing these two interests in *Byers,* the Court looked primarily at two factors: 1) the likelihood that compliance with the self-reporting requirement would incriminate the person submitting the report, and 2) the importance of the required information to the government's effective pursuit of its nonpunitive objectives. The following examples illustrate the apparent balance which the Court has achieved by an application of these two considerations.

When the Court has found that the information required by the self-reporting provision involved a low possibility of incrimination of the individual, and the government's need to collect and use the information was substantial, the Court has generally refused to permit the application of the privilege. *See California v. Byers,* 402 U.S. 424 (1971). *See generally United States v. Sullivan,* 274 U.S. 259 (1927). (In dicta, in *Sullivan,* the Court indicated that the privilege would probably not apply to information relating to the *amount* of income in light of the government's need for such information in order to collect taxes and the low possibility of incrimination.)

When the Court has found that a substantial risk of incrimination existed, and the government's need for the information was not substantial, the Court has suggested that the invocation of the privilege would probably be permitted. *See generally United States v. Sullivan,* 274 U.S. 259 (1927). (For example, from the facts of *Sullivan,* it could be inferred that the privilege might properly apply with respect to information relating to the *source* of the income since such information would be highly incriminatory and the government did not need that information in assessing an income tax.)

When the Court has found that there was both a high risk of incrimination to the individual and, arguably, a strong governmental need for the information, the Court has resolved the conflict in favor of the privilege. *See generally Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965). (In *Albertson,* the Court found that registration as a communist posed a substantial risk of incrimination, which outweighed a presumably strong governmental need to identify potential subversives in order to control subversive activities.) *See also Marchetti v. United States,* 390 U.S. 39 (1968). (In *Marchetti,* the Court concluded that the payment of the occupational tax on gambling carried a substantial risk of incrimination which outweighed the government's acknowledged need for information regarding the identity of gamblers to permit it to collect occupational taxes from them.) *See also Grosso v. United States,* 390 U.S. 62 (1967).

The Court's resolution of a "true conflict" (equally strong individual and governmental interests) in favor of the application of the privilege against self-incrimination demonstrates a policy of resolving doubts in favor of the application of the privilege wherever it appears likely that individual rights and values protected by the privilege may be substantially threatened, regardless of the governmental interest which might be impaired. This principle is consistent with the traditional liberal interpretation of the Fifth Amendment privilege and the protection of the principles underlying it; namely, the fostering of an accusatorial system of justice and the establishment of a fair balance between individual and government.

B. APPLYING THE BALANCING TEST, THE PRINCIPLE ESTABLISHED BY THE SELF-REPORTING CASES DICTATES THAT THE FIFTH AMENDMENT PRIVILEGE BE RECOGNIZED IN THIS CASE SINCE THE LIKELIHOOD THAT THE §311(b)(6) PENALTY IS PUNITIVE IS SUBSTANTIAL AND THE GOVERNMENTAL INTEREST AT STAKE IS RELATIVELY INSIGNIFICANT.

Even if this Court does not conclude, as the Tenth Circuit Court of Appeals did, that the indicators of congressional intent unquestionably show a punitive purpose, the amici believe that, at the very least, the indicators show a real and substantial likelihood of a punitive intent. In that instance also, the privilege must be applied. A balancing of the competing individual and governmental interests in this case weighs heavily in favor of the Fifth Amendment privilege. At this point in the brief, little more needs to be said to show the offensive nature of the regulatory scheme involved and the threat which it poses both to an accusatorial system of justice and to a fair individual-government balance. What does remain to be said is that the government's interest in the operation of the regulatory scheme, without the restriction of the use immunity fashioned by the Tenth Circuit, is not substantial.

While no one would discount the necessity of the §311(b)(5) report in administering the FWPCA, just as the accident report was important in *California v. Byers, supra,* the imposition of the automatic §311(b)(6) penalty (which was designed specifically to be used in conjunction with the §311(b)(6) report) is much less important than the independently-established criminal penalties on traffic violations which were involved in *California v. Byers, supra.* One of the tests articulated by this Court for determining the substantiality of the government's need to demand certain information and to impose certain penalties is whether "other methods entirely consistent with the constitutional limitations" exist. *Haynes v. United States,* 390 U.S. 85, 89 (1968). The nonpunitive purposes identified for the §311(b)(6) penalty could be accomplished equally well, if not better, by alternative statutory schemes. If Congress intends that industry, and not the public, should be responsible for the costs of cleaning up oil spills for which no responsible entity is identifiable and the costs of administering the FWPCA, an occupational tax could simply be placed on members of that industry and then used to finance the FWPCA. If it is Congress' purpose to collect damages for irremediable injuries to navigable waters, then

such damages, like other damages under the Act,[24] should be collected only from those whom the government can show were at fault in discharging oil into navigable waters and the irremediable injuries for which no one is responsible should be paid for from the general fund. There is no substantial need for the government to use the §311(b)(6) penalty to accomplish either of these purposes.

However, if Congress' purpose is to punish those individuals and companies which discharge oil into navigable waters in order to deter all conduct which may lead to such discharges, whether intentional or entirely innocent, then the government must shoulder the burden of imposing the §311(b)(6) penalty by its own individual efforts regardless of the relative efficiency of making individuals impose the penalty on themselves.

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[24] *See, e.g.,* §§311(f)(1)-(3). Pet. App. at 46a-49a. *See also* 33 U.S.C. §1321(f)(1)-(3) (Supp. 1977).

CONCLUSION

Because the indicators clearly show that Congress' purpose in enacting the §311(b)(6) penalty was punitive and because the threat to the values of the Fifth Amendment privilege posed by the FWPCA's enforcement scheme far outweighs the government's need to accomplish any nonpunitive objective by imposing the §311(b)(6) penalty, the holding of the Tenth Circuit Court of Appeals should be upheld.

Respectfully submitted,

JAMES G. WATT
KEA BARDEEN
1845 Sherman Street, Suite 675
Denver, Colorado 80203
Attorneys for Amici Curiae
Mountain States Legal Foundation
Independent Petroleum Association of the Mountain States
Rocky Mountain Oil & Gas Association
Independent Petroleum Association of America

APPENDIX

Table Comparing Various Courts' Applications of the *Mendoza-Martinez* Factors to the § 311(b)(6) Penalty

Explanation of Appendix

The following table summarizes how the various federal district courts and the Tenth Circuit Court of Appeals have applied the *Mendoza-Martinez* factors to the § 311(b)(6) penalty. With respect to each factor, the analysis is broken down into three stages. The first column, "Application," sets forth each court's answer to the individual question outlined in *Mendoza-Martinez*. The "yes" or "no" answer represents the result of the court's straightforward application of the test to the specific facts of the case.

The second column, "Inference," sets forth each court's perceptions of the significance of its factual conclusions in terms of what each conclusion indicates about the purpose of § 311(b)(6). The inferences are expressed in each court's own terminology to the extent possible.

The third column, "Reasoning," summarizes how each court justified its application and its inference for each factor. The language used by the court which is quoted was, of necessity, often paraphrased or edited.

MENDOZA-MARTINEZ FACTORS ❯	1) Affirmative Disability or Restraint?		
CASE	Application	Inference	Reasoning
**United States v. LeBeouf Bros. Towing Co.*, 377 F. Supp. 558 (E.D. La. 1974) (Fifth Amendment privilege)			
United States v. Eureka Pipeline Co., 401 F. Supp. 934 (N.D. W. Va. 1975) (due process clause)	Yes	None	Penalty is similar to §204 of the Economic Stabilization Act which was found to impose a restraint in *U.S. v. Futura*, 339 F. Supp. 162 (N.D. Fla. 1972)
United States v. General Motors Corp., 403 F. Supp. 1151 (D. Conn. 1975) (due process clause)	No	not necessarily criminal	Sup. Ct. cases in which this factor indicated a criminal penalty concerned different sanctions.
Ward v. Coleman, 423 F. Supp. 1352 (W.D. Okla. 1976) (Fifth Amendment privilege)	Yes	"Civil"	Since only a monetary sanction is imposed and it is collected through a civil procedure, the restraint is civil.
Ward v. Coleman, 598 F.2d 1187 (10th Cir. 1979) (Fifth Amendment privilege)	No	"little indication"	Monetary penalties do not involve the type of disabilities and restraints which occur in the revocation of a previously granted governmental privilege.
Brief for the United States	No	"Remedial"	*Mendoza-Martinez* intended to include only restraints on personal liberty, not the consequences of monetary assessments. Pocketbook impacts point to remedial intent.

*The Court in this case did not answer the questions individually but rather came up with a first conclusion based on an application

TABLE COMPARING VARIOUS COURTS' APPLICATIONS OF THE MENDOZA-MARTINEZ FACTORS TO THE §311(b)(6) PENALTY

2) Historically Regarded as Punishment?			3) Scienter Requirement?			4) Promotes Retribution and Deterrence?			5) Behavior Already a Crime?			6) Connected to an Alternate Purpose?			7) Excessive Penalty?			Conclusion
Application	Inference	Reasoning	Application	Inference	Reasoning	Application	Inference	Reasoning	Application	Inference	Reasoning	Application	Inference	Reasoning	Application	Inference	Reasoning	
																		Punitive
Yes	Inconclusive "Civil"	Traditionally a criminal punishment, but the collection of monetary penalties as a civil remedy is widely accepted. Collection of penalty through a distinctly civil procedure implies intent to impose a civil sanction.	No	None	None	Retribution: not answered Deterrence: Yes	"Does not render it criminal"	That discharge should be subject to penalty even though cleanup is not practical indicates a deterrent result. This alone does not render it criminal.	Yes	"not determinative"	The fact that it is criminally punishable is not determinative since Congress may impose both a criminal and a civil sanction for the same act.	Yes	Remedial	Compensation to government for tortious damage to environment, which is to be imposed even though defendant cleans up discharge. Collected as a penalty to cover administrative costs.	No	Civil	Indication of desire to make the penalty civil is supported by the provision that factors relating to the ability to pay and the gravity of the offense are to be considered in computing the penalty.	Test "fails to indicate"
Yes	Inconclusive	Fines are a form of punishment, but are acceptable where they serve a remedial rather than a punitive function. Therefore, question remains as to whether it is remedial or punitive.	No	Remedial	None	Retribution: No Deterrence: Yes	"Does not indicate criminal"	Civil penalties are often used to bring about compliance with regulations of administrative agencies through deterrence.	No direct answer	"ambiguous"	Does not constitute a means of adding additional punishment. Points to the criminal nature of the sanction only where its function is to punish rather than to regulate.	Yes (?)	Civil	Overriding purposes are the elimination of oil spills through deterrence and the collection of revenue to clean up discharge. Punishment is an unavoidable by-product.	No	Civil	Factors to be taken into account in fixing the penalty provide flexibility.	Remedial
Yes	Inconclusive	Fines have long been imposed, but civil penalties are not uncommon in federal law.	No	Remedial	None	Retribution: No (?) Deterrence: Yes	"Does not make it criminal"	Difficult to separate deterrence from a regulatory scheme.	Yes	Inconclusive	Relied expressly on *Eureka Pipeline* and *General Motors*.	"No need for search for some alternative purpose."	Compensatory and remedial	Purpose is to defray costs of administration and cleanup.	No	Civil	Mitigating factors may be taken into account in assessing the penalty, which indicates civil character.	Civil, Remedial
Yes	"little indication"	Monetary penalties have traditionally been applied to both criminal and civil statutes.	To impose: No To assess: Yes	criminal	Factors used in determining amount of penalty indicate scienter req. Even if not, §407 of Rivers and Harbors Act is a criminal penalty and it does not require scienter.	Retribution: Yes Deterrence: Yes	"Penal"	Penalties are based on gravity of violation, degree of culpability, prior record. Good faith and subsequent cleanup of one's own discharge are given no consideration, which indicates a penal nature.	Yes	Criminal	§407 of Rivers and Harbors Act specifically prohibits discharge of refuse into navigable waters. Factual situation in *U.S. v. White Fuel Corp.*, 498 F.2d 619 (1st Cir. 1974) is almost entirely analogous.	No	Non-remedial	Could be compensatory if the factors involved in determining the amount of penalty were reasonably related to the damage to the environment. They are not.	could be	Punitive	Imposition of penalties even where discharge is accidental, non-negligent and non-intentional could be excessive. Large businesses can be unduly penalized even where there is lack of fault.	Criminal
No?	"Remedial"	Relies on *Helvering v. Mitchell*, 303 U.S. 391 (1938)	No	"Tends to establish remedial"	The only pertinent factor is "gravity of the offense," which is not a scienter requirement. This factor considers degrees of care, intent, and the amount discharged.	Retribution: No Deterrence: Yes	"Remedial"	Congress expected §311(b)(6) to serve a deterrent function. Deterrent effect must be in excess of what is reasonably related to remedial purposes to be judged criminal. Statute's aim is to reach the conduct engaged in, rather than the person engaging in it.	Yes	Does not prove criminal intent.	Congress may impose both a criminal and a civil sanction in respect to the same act or omission. To be criminal, Congress must intend the sanction to be additional punishment for the same conduct.	Yes	Remedial	The money is used to defray administrative costs, to compensate for environmental damage and to encourage compliance. These are remedial objectives.	No	Non-punitive	Penalty can be tailored to meet the gravity of the violation. Proper application will not render it excessive. Innocence and cleanup efforts do not erase environmental effects.	Civil

of the *Mendoza-Martinez* factors.